Supreme Court, U.S.
FILED
07-966 JAN 22 2008
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No. 1

In The
Supreme Court of the United States

OVERVIEW BOOKS, LLC
AND LEV TSITRIN,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition involves a Library of Congress program which provides to the books of eligible publishers a bibliographic record with detailed keywords, publicizes member books worldwide, and conspicuously marks member books. Participation in this program is a baseline requirement for attempting to sell to major library systems and book distributors. Books by publishers who publish fewer than three authors and books written by the same person who publishes them are not eligible.

The questions before the Court are:

1. Whether a regulation that so benefits a favored set of commercial enterprises, while depriving a disfavored class of copyright holders of access to the channels of book distribution, is a compensable taking of property under the Fifth Amendment of the U.S. Constitution (with First Amendment analysis proper to the resolution of the question).

2. Whether this is a legal taking for the public good.

3. Whether, in granting a motion to dismiss, it is error to fail to accept all undisputed facts and documentation presented by the non-movant as true and fail to draw reasonable inferences in the non-movant's favor and whether summary judgment is instead required where the proponent thereof presented affidavits and documentation to substantiate their position, while the opposition consisted solely of an attorney's conclusory allegations and unsubstantiated speculation.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Petitioners make the following disclosure:

Petitioner Lev Tsitrin is the sole owner of Overview Books, LLC.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully request that a writ of *certiorari* be granted to review the judgment and order of the United States Court of Appeals for the Federal Circuit entered in this proceeding on August 17, 2007 which held that an author did not have a compensable takings claim based on a regulation which declared books produced by a disfavored class of entities as unlikely to be of interest to the nation's libraries and prevented such entities from marketing to libraries and large scale book vendors.

OPINIONS BELOW

The Opinion and Order of the United States Court of Federal Claims, filed on July 24, 2006, is reported as 72 Fed.Cl. 37 (2006) and has been included in the Petitioners' Appendix ("P.App.") at P.App. B, pp. 3a – 24a. The Judgment of the United States Court of Appeals for the Federal Circuit, issued on August 17, 2007, is available at 232 Fed. App'x 989 (Fed. Cir. 2007) and has been included in the appendix at P.App. A, 1a, 2a. The Order of the United States Court of Appeals for the Federal Circuit denying Petitioner's Request for Rehearing en banc, issued on October 22, 2007, is available at 2007 U.S. App. LEXIS 25713 (Fed. Cir. Oct. 22, 2007) and has been included in the appendix at P.App. C, 25a – 26a.

JURISDICTION

The U.S. Court of Appeals for the Federal Circuit issued its judgment on August 17, 2007. The Court of Appeals entered its order denying rehearing en banc

on October 22, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL and STATUTORY PROVISIONS and REGULATIONS INVOLVED

Plaintiffs challenge eligibility requirements of the Library of Congress Cataloging in Publication (CIP) Program. The complained of regulations state:

> Publishers who have published the works of fewer than three different authors are ineligible. Self-publishers (i.e. authors and editors who pay for or subsidize publication of their own works; who often do not publish the works of more than three different authors; and whose works are rarely widely acquired by the nation's libraries) are ineligible. Publishers ineligible for the CIP program may be eligible for the Preassigned Control Number Program.

http://cip.loc.gov/eligibility.html (text online dated 31 October, 2007)

The CIP Program provides a conspicuous branding for each book which is part of it and a number of other benefits more fully reproduced at P.App. D, 30a – 37a:

> The completed CIP data is then transmitted to the publisher, who prints it on the verso of the title page. At the same time, a machine-readable version of the record is distributed to large libraries, bibliographic utilities, and book vendors around the world.

http://cip.loc.gov/process.html (text online dated 31 October, 2007)

Damages to a book which is not involved in the CIP program include:

> Book vendors also require the verified record because many libraries that purchase their books from a vendor expect them to be shipped with catalog card sets that reflect the final verified CIP record.

http://cip.loc.gov/process.html (text online dated 31 October, 2007)

The CIP Program's stated goal and neutrally stated eligibility requirements:

> The CIP program limits eligibility to titles that are most likely to be widely acquired by the nation's libraries. These titles must be forthcoming monographs that include a U.S. place of publication on the title page. They must also be published by a U.S. publisher that maintains editorial and production offices in a U.S. city with a staff capable of answering substantive bibliographic questions that may arise during the cataloging process.

http://cip.loc.gov/scope.html (text online dated 31 October, 2007)

The full set of publicly available CIP Program regulations are at http://cip.loc.gov/ and are reproduced at P.App. D, 30a – 37a.

Plaintiffs' suit to recover money damages and ancillary relief against the United States was authorized by the Tucker Act, 28 U.S.C. § 1491 (a):

> (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render

> judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

Plaintiff's' claim against the United States was founded on the Takings Clause of the Fifth Amendment of the Constitution and Plaintiffs further challenged the regulation as unconstitutional under the Due Process Clause of the Fifth Amendment.

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Plaintiffs likewise challenged the regulation as unconstitutional under United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Other relevant statutory provisions involved are the Copyright Ownership provision 17 USC § 201 and the Copyright provision of the Tucker Act 28 U.S.C. § 1498(b), both reproduced at P.App. D, 27a – 30a.

STATEMENT OF THE CASE

Overview Books, LLC and Lev Tsitrin ("Petitioners") brought the current case before the U.S. Court of Federal Claims, challenging two eligibility requirements of the Library of Congress Cataloging in Publication (CIP) Program as a taking by the US government of their property under the Fifth Amendment of the US Constitution and requested compensation as authorized by the Tucker Act, 28 U.S.C. § 1491 et. sub. As authorized by the same law, Petitioners asked for ancillary injunctive relief on the grounds that the complained-of rules are unconstitutional, unreasonable, and must be struck down.

Begun in 1971, the CIP program's stated purpose is to catalogue books "most likely to be widely acquired by the nation's libraries" (see "Regulations Involved" above and CIP Eligibility, P.App. D, 32a).

However, there is no review or examination process for the books themselves. Rather, there are some book

format requirements (i.e.: no e-books or computer files) and a number of qualifications for the publisher of the book, including a US office and contact personnel, to facilitate communication with Library of Congress employees during the cataloging process. (see "Regulations Involved" above and CIP Scope at P.App. D, 33a).

There are a number of benefits to a book enrolled in the CIP program (see the "Findings of Uncontroverted Fact," which were accepted by the Court of Federal Claims unopposed by Respondent, at P.App. F, 42a – 48a, "Regulations Involved" above, and the full set of CIP regulations at P.App. D, 30a – 37a). These can be briefly summarized as follows: (1) the Library of Congress creates a set of descriptive keywords for the book, (2) the book is added to the Library of Congress catalogue, (3) the keywords and other CIP data are added to the back of the title page, (4) a catalogue of forthcoming CIP approved titles is sent to libraries, bibliographic utilities, and book vendors around the world (many of which in turn create their own book catalogue with the government-provided information and redistribute it to their customers).

More importantly, there are fatal liabilities to a book which is denied entry to the CIP program (again, see the undisputed "Findings of Uncontroverted Fact," at P.App. F, 42a – 48a, et al.): (1) As the CIP program regulation materials specify – automated libraries and book vendors (the suppliers to the book market including the large chain conglomerates which have displaced most individualized book sellers) "expect [books] to be shipped with catalog card sets that reflect the final verified CIP record." Therefore, books not

part of the CIP are denied access to all of the consequent markets. (2) With CIP member books marked conspicuously, a book not so marked is immediately identified by anyone in the book distribution business as deficient. The large scale, influential reviewers, like *Publishers Weekly* and *The New York Times Book Review,* have policies not to review such deficient books (P.App. E, p. 39a, ¶ 4) precisely because of the above described distribution problem – because readers of the review would be unlikely to find the book in their local store (P.App. E, p. 40a). This creates a downward vicious cycle as reviews are a major method to generate not just individual sales, but sales to stores and store chains (cf. P.App. E, p. 38a, ¶ 1).

The Petitioners, an author and Brooklyn, NY based publisher were ready and able to satisfy all the above requirements in submitting Mr. Tsitrin's book, *The Pitfall of Truth* to the program.

However, two CIP eligibility requirements have nothing to do with the book, the book's format, or the facilities of the publishing entity. The two requirements which disqualified *The Pitfall of Truth* are based solely on the identity of the submitter as someone other than an established publisher. That is books of authors who publish their own work and books which are published by a company which has not published three or more authors are not eligible (see "Regulations Involved" above and CIP Scope at P.App. D, 33a).

The CIP program has thus become a licensing scheme without which a book can not enter the

distribution stream – both the marketplace of ideas and the financial marketplace.

Further, the two challenged eligibility requirements have split the world of books into two different objects – "real" books, published by "real" publishers, and "self published" or "vanity" books – a dichotomy which did not exist when Benjamin Franklin published his aphorisms, when Mark Twain created his own company to publish his own books, when Walt Whitman and his friends arranged the publication of *Leaves of Grass* after it was rejected by the "real" New York publishers.

Moreover, this is a dichotomy created to no public interest purpose. As W. Somerset Maugham quipped long before the CIP came into being, "The great American novel has not only already been written, it has already been rejected." With the finances necessary to publish their work unavailable to most authors, publishers have always been at best a necessary evil, unskilled in choosing or developing writing, and this inability to recognize value has only become worse as they have become ever more conglomerated – freely admitting that the majority of submissions are rejected unread and that the author's celebrity is more important to their choice to publish then true expertise in the given subject. At the same time, as technology allows for quality books to be created more and more cheaply, the publishing conglomerates have become less and less necessary – except for the artificial stigma and distribution barrier to "small-publishing" maintained through the CIP.

Petitioners thus challenge these two eligibility requirements which discriminate between established publishing companies and small and author-owned publishers – regulations which have nothing to do with either the quality of the book or the practicalities of cataloging but have substantially altered the nature of book distribution to prevent access of the author and publisher's intellectual property to its market – thereby destroying its value and viability.

REASONS FOR GRANTING THE PETITION

I. Overview of the Argument – Upholding Property Rights in Works of the Intellect

The case before the Court involves the nature, interaction and integration of fundamental Constitutional principles: (1) property and the rights and remedies attendant to the taking thereof by the U.S. government; (2) the public interest, and the speaker's private interest, in the unfettered flow of ideas as expressed through a free press. In sum, this case is about the permissible extent and nature of government intervention in the marketing and distribution of books.

Over a hundred years ago, Mark Twain fought to define this interplay of property and ideas when he appeared repeatedly at Congressional hearings on Copyright, striving to protect his livelihood and the inheritance of his children from unscrupulous publishers. Rudyard Kipling described Twain's struggle:

> "What I saw with the greatest clearness was Mark Twain being forced to fight for the simple proposition that a man has as much right to the work of his brains (think of the heresy of it!) as to the labour of his hands."

Kipling, Rudyard, *From Sea to Sea and Other Sketches (Letters of Travel)* Volume 2, No. XXXVII (1899)

Even before Twain's struggle with the legislature for the creator's property right to his books, this Court echoed Twain's position that creative works are property akin to real estate: "A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions." *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96, 24 L. Ed. 68, 69 (1876) The lower courts have commonly accepted this characterization to find that government infringement of intellectual property rights constitutes a taking by eminent domain, compensable under the Fifth Amendment, with that compensation calculated based on losses to the owner rather than profit to the government from the taking. *Gargoyles, Inc. and Pro-Tec, Inc. v. U.S.*, 113 F.3d 1572 (1997); *Hughes Aircraft Company v. U.S.*, 86 F.3d 1566 (1996); *McCreary v. U.S.*, 35 Fed. Cl. 533, 536 (1996); *Dow Chemical Co. v. U.S.*, 32 Fed. Cl. 11, 19 (1994); *Leesona Corp. v. U.S.*, 599 F.2d 958, 964 (Ct. Cl. 1979).

Certainly, the current Copyright law uses unambiguous language of property in describing an author's rights to his work – as for example: "ownership ...may be transferred in whole or in part by any means of conveyance or by operation of law,

and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession" 17 USC § 201(d)(1) (reproduced in full at P.App. D, pp. 27a – 28a).

Yet, though the property rights to books, and government takings thereof, are dealt with by the same laws which address other intellectual property (ie: 17 U.S.C. § 201, 28 U.S.C. § 1491, 28 U.S.C. § 1498), the decisions in the current case by both the Court of Federal Claims and the Court of Appeals for the Federal Circuit are inconsistent with above referenced decisions on patents. The decisions illustrate their basic confusion on how to integrate the fundamental principles of property rights and free expression when dealing with a regulation through which the government destroys the viability of an author's property. Unfortunately, under the Tucker Act, these are also the only courts with jurisdiction to provide a remedy for such a taking.

The CIP program was implemented in 1971 and over the past 37 years the challenged rules have created a strong counter-market force to entrench large corporation publishing and disrupt efforts at business-viable independent publication. At the same time, the technology of publishing has made independent publication ever more practical, were it not hindered by said regulation. However, due to the substantial chilling effect of the regulation on independent writing, the prohibitive financial costs to an independent author or publisher of the court review process, as well as psychological and social inertia that accepts a wholly artificial status quo as the proper method of book creation and distribution, challenges to

this regulation are seldom likely to come before the Court. Therefore, review of the current case by this Court is both timely and necessary.

II. The Library of Congress has created a "club" of government-favored publishers – violating fundamental public interest principles.

In the first half of the twentieth century, a group of news publishing companies gathered together to create The Associated Press, a voluntary member association which would provide the benefit to members of sharing the distribution of news. However, the Supreme Court found in *Associated Press v US*, 326 US 1 (1945) that by providing the benefit to their members, the Associated Press so substantially disadvantaged the non-member publishers as to restrict access to the News gathering and distribution stream, creating a restraint of trade in violation of the Sherman Act. Part and parcel of that violation – the unreasonableness of the impact on the industry – was the fact that the by-laws impeded the unfettered distribution of first amendment expressive speech.

Before the court right now, is a situation where the set of established book publishers did not form any sort of private association to keep out potential competitors. Instead, the government did it for them via the complained-of CIP eligibility requirement.

With the CIP eligibility requirement the government established a structure where books published by a group of government favored commercial entities are provided with the only possible

method of entry into a sizeable part (and more importantly a keystone part) of the book publication and distribution market – "...vendors also require the verified record because many libraries that purchase their books from a vendor expect them to be shipped with catalog card sets that reflect the final verified CIP record." (CIP Process, P.App. D, p. 32a)

These books from government favored commercial entities are likewise set up with keywords and listed in a database accessible and searchable through these keywords by any and all libraries and vendors – from which the books of un-favored publishers are kept out and therefore rendered invisible to stores and libraries searching for new titles on a given subject. The books of favored publishers are advertised worldwide as "a machine-readable version of the record is distributed to large libraries, bibliographic utilities, and book vendors around the world" (CIP Process, P.App. D, p. 32a), and prominently branded, by the placement of "CIP information" on the verso of the title page, with a full page sign that marks them as certified by the Library of Congress as "most likely to be widely acquired by the nation's libraries." (CIP Scope, P.App. D, 33a) The lack of this prominent mark of Congressional favor then leads to the disfavored books being further blocked as they are disqualified from consideration for review by the influential periodicals (ie: P.App. E, p. 39a, ¶ 4) and therefore shoved even further away from the book distribution stream since the small book stores use the review periodicals to make buying decisions (ie: P.App. E, p. 38a, ¶ 1).

The Supreme Court in the *Associated Press* case held as a given that the government would not be able

to do what the Associated Press did when the court said that the association's private nature would not allow them to get away with their action. "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some." *Associated Press v US*, 326 US 1, 20.

In the matter before the court, the government has acted like the Associated Press in 1945 – creating a club of favored established publishers, who can then chose what is available to the public to read, and outgrouping the rest to doom their works to almost certain oblivion. The Supreme Court in 1945 saw it as a given that such an action in restraint of trade in First Amendment matter by the government would be prohibited and we respectfully urge that this Court grant certiorari to address the constitutionality of the government regulation favoring certain publishers over others and to correct the unconstitutional CIP eligibility requirement.

III. Whole, Distinct Parcel Theory – a fundamental tenet of property takings law thoroughly ignored by the lower court

In its Order, the lower court embraced the position of the government that there was no taking because "Mr. Tsitrin had an unfettered ability to pursue a relationship with a publisher that would have qualified for participation in the CIP program... alternatively ...Overview Books could have published three books by different authors that would have

qualified its future publications for inclusion in the CIP program." (P.App. B, p. 16a) This runs contrary to the most basic tenets of takings law.

The takings cases treat as a given the position that for purposes of establishing a full taking under *Lucas v South Carolina Coastal Council*, 505 U.S. 1003 (1992) or doing a takings analysis under *Penn Central Trans. Co. v New York City*, 438 U.S. 104 (1978), the relevant property object to examine is a single distinct item of property. While the specifics of what makes for such a single item (the so-called "takings denominator") have been the topic of hot contention, at the basis of each dispute and each court's solution to the dispute remained the assumption that the thing being taken had to be one parcel. *Palazzolo v Rhode Island*, 533 U.S. 606 (2001) (petitioner urged that the upland part of his property should be treated as distinct from the wetlands too late in the game for the court to entertain it); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177 (Fed. Cir. 2004) (Rose Acre urged that each condemned egg be treated as a separate property parcel or at worst each hen house which was effected. On the other extreme, the government urged that all three of Rose Acre's farms which were effected be treated as one parcel – "it would seem that the 'parcel as a whole' rule applies with even greater force here, where no unique attribute inherent in the restricted portion provides a basis for distinguishing it from the unrestricted portion, than might be the case with real property."); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470 (1987) ("There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.")

While disputes may certainly arise over exactly what chunk of land, owned and utilized by the same owner, constitutes the relevant parcel of property, we submit that a book is the ultimate unique item. There can be no doubt that Shakespeare's *Merchant of Venice* is distinct from Shakespeare's *Hamlet* and at least as distinct from Marlowe's *Jew of Malta,* and that the *Jew of Malta* is distinct from *The Maltese Falcon*, which is quite distinct from *The Dresden Files*. Tricks may be played to redefine parcels of land but there is no way to redraw distinctions between books. The question of whether the regulation is a taking must be examined with respect to the one individual book which was impacted.

As basic as the proposition that each parcel needs to be considered by itself, is the position that "the right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984), quoting *Kaiser Aetna* 444 U.S. 164, 176 (1979).

The lower court was clearly in error to premise its rationale that a taking has not occurred on the possibility that if Lev Tsitrin were to have sold *The Pitfall of Truth* to a CIP-approved commercial entity or if Overview Books were to have published three other authors and thereby become CIP-approved, *The Pitfall of Truth* would have been eligible for the CIP. Rather, the court's admission that the issue must be solved by joining with others is the recognition that the regulation results in the deprivation of fundamental property rights.

We therefore respectfully urge that this Court grant certiorari to address these basic issues of treating each parcel of property as distinct and recognizing the right not to join with other authors or to sell out to another publisher.

IV. Distinct Investment Backed Expectations in property effected by a pre-existing regulation

In its decision on the current case, the Court of Federal Claims asserted that, because the CIP eligibility restriction was in place at the time Lev Tsitrin wrote his book and published it through Overview Books, Overview Books can have no reasonable investment backed expectations (the second component of the regulatory takings analysis under *Penn Central Trans. Co. v New York City*, 438 U.S. 104 (1978)) which were thwarted by the CIP eligibility restriction.

However, that understanding of the "investment backed expectations" rule is contrary to this Court's well established position. If the lower court were right in their simplistic understanding of the "investment backed expectations" rule, the state would be able to escape its obligations by being "allowed, in effect to put an expiration date on the Takings Clause." *Palazzolo v Rhode Island*, 533 U.S. 606 (2001).

For three thousand years, except when oppressive governments have purposefully restricted authors, "Freedom of the press [has belonged] to those who own one" (A.J. Liebling) – anyone who had a book and the money to publish it had full, unfettered access to

compete in the marketplace of ideas (and this was certainly true when Benjamin Franklin, Mark Twain, and Walt Whitman "self published" their works). However, this very nature of publishing was transformed when the CIP became integrated into the distribution process and the lack of a CIP deprived the book's owner of all but a token sliver of the marketplace of ideas by putting the book out of contention for many libraries and vendors and making it invisible to others, eliminating it from consideration of the more important reviewers, and branding it as a second rate item deprived of the government's stamp of approval on the back of the title page.

But "a State, by ipse dixit, may not transform private property into public property without compensation" *Webb's Fabulous Pharmacies, Inc. v Beckwith*, 449 U.S. 155, 164 (1980)[1] and therefore "[f]uture generations, too, have the right to challenge unreasonable limitations on ...use" *Palazzolo v Rhode Island*, 533 U.S. 606 (2001). Thus, this Court explicitly held that the so-called "investment-backed expectations" survive purchase and inheritance and are rightfully claimed by heir, successor, or post-enactment owner. There is no expiration date on a taking – it should not matter that Lev Tsitrin wrote his book after the integration of the CIP into the distribution system any more than it would matter if

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[1] Nor, certainly, destroy its value without public benefit. *First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California*, 482 U.S. 304 (1987); *United States v General Motors Corp.*, 323 U.S. 373 (1945); *Pumpelley v Green Bay Co*, 13 Wall.166 (1872) . (cf. A46, 52).

a real property owner bought that land after a regulatory taking occurred. It is thus necessary for this Court to grant Certiorari to clarify the place of the "investment backed expectations" rule in situations of post-enactment ownership of property.

V. The Property Right to the CIP – A Secondary Independent Property Right

The property right chiefly focused on above – of the author and his chosen publisher in the book – is a fundamental property right of Common Law origin (recognized likely from the beginning of writing, and certainly from the Renaissance[2]) and established in US statutes including the Tucker Act and Copyright Law as already discussed.

There is however a second property right, independently sufficient to find that the courts below have erred in failing to provide CIP membership to *The Pitfall of Truth*. This is the property right to the CIP itself.

As mentioned above, Overview Books, LLC is a duly established publishing company with editorial

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[2] "Hear, you pirate of other people's work and you thief of artistic property, who wants to copy my work with insolent hands: beware..." wrote Albrecht Durer in a "copyright notice" to his 1511, "self published" book of woodcuts, warning of punishments to copyright violators by the Emperor Maximillian.
William H Schab Gallery, *Catalogue Forty-five: Great Master Drawings and Prints* (circa 1975) Item 54 "Albrech Durer (1471-1528) The Apocalypse. 16 woodcuts including title."

and production offices in a U.S. city with a staff capable of answering bibliographic questions. It is not a vendor or other intermediary. *The Pitfall of Truth* was a forthcoming monograph, never published before, not published on demand, with no preassigned Library of Congress control number (LCCN), neither an E-book, computer file, serial, gift book, or travel guide, or any of the other types of object ineligible for CIP. It was to include a U.S. place of publication on the title page and is a title most likely to be widely acquired by U.S. libraries[3]. (See CIP Scope at P.App. D, p. 33a)

Though the book was precisely the type of printed matter described for membership in the CIP and the submitting copyright holder had precisely the type of facilities required for proper CIP support under the CIP Scope regulations, CIP membership was withheld because of an arbitrary, capricious, and unconstitutional decision by the Library of Congress – embodied in the challenged regulations that the books of authors and publishers of three authors or fewer are not good enough[4].

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[3] Arguably, a title like *The Pitfall of Truth*, examining the interplay of religion and terrorism is of at least as much interest to the library-going public as the CIP-worthy "non-fiction" work from Simon & Schuster , with the CIP keywords "1. Human-alien encounters – United States. 2. Alien abduction – United States."(Jacobs, David, M. *The Threat – Revealing the Secret Alien Agenda*, 1999).

[4] It is worth pointing out at this point that not only are the challenged eligibility requirements arbitrary and unconstitutional for all of the reasons the Court is urged to consider throughout this Petition, they are in-fact self contradictory. While other

VI. Interplay of Fifth Amendment Property Rights and First Amendment principles

Implicit in the decision in *Associated Press v US*, 326 US 1 (1945) was the principle that even where the First Amendment would not in itself necessarily decide the matter, or may be insufficient to establish jurisdiction over the matter (this was a Sherman Act restraint of trade case and the Associated Press was a private actor technically not obligated to protect anyone's First Amendment interests), the interplay of fundamental First Amendment principles with the more pedestrian issues of the case would shift the matter to the proponent of the interest of robust and unhindered press.

Since that time, the Federal Circuit has explicitly held in a number of cases that, in a properly brought Fifth Amendment takings case, it would be proper and necessary in exploring the level of infringement on property rights by the government to fully consider the impact of First Amendment and other basic Constitutional issues: "The determination of Mr. Holley's entitlement to remedy ...may include consideration of whether his removal violated constitutional rights ...Indeed, a procedural violation asserted to be of constitutional dimension is of particular judicial concern." *Holley v US*, 124 F3d 1462 (1997) relying upon a broader proposition by this

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eligibility rules specify that submissions by any intermediaries are ineligible, the challenged rules specify that only those publishers who have not authored the book may submit it – in other words, only intermediaries are permitted to submit.

Court that administrative rules could not without very specific assertions foreclose constitutional claims. *Bowen v Michigan Academy of family Physicians*, 476 US 667, 681 n.12 (1986) (citing *Weinberger v Salfi*, 422 US 749 (1975)). That is to say, if the individual was removed from his job in violation of some constitutional right, then that removal would constitute a taking of his property.

Contrary to this history, the US Court of Federal Claims believed that they were far more limited in the consideration of other constitutional claims "alleged violations of the First Amendment may only be considered ...when making a determination whether payment is due..." (Opinion, P.App. B, p. 12a) and evidently the Federal Circuit upheld their position that the unconstitutionality of the complained of regulation could not be considered.

This case involves an item of property – the author's ownership rights in a book – which is inherently bound up with First Amendment expressive speech. A second property right is likewise before the court which is premised on the existence of a rational and legal CIP program and a challenge to part of that program as arbitrary based in large part on its nature as contrary to the requirements of the First Amendment. Certiorari is therefore necessary to consider what the proper place of First Amendment violations by the government is in a Tucker Act takings controversy.

VII. Defining Government Censorship

The Court of Federal Claims wrote that "the CIP program's principle restrictions – on self published works...are unrelated to the regulation of speech or expression." In reality the contested regulations are far from subject matter neutral.

Rather, Congress has used these regulations to abandon their own decision making and transfer it to a group of private entities, "confer[ing] broad powers of censorship" Reno *v ACLU*, 521 U.S. 844 (1997) as the regulations assume that the larger, non-author publishers will sift through the books leaving only those "titles that are most likely to be widely acquired by U.S. libraries." The Library of Congress has, in effect, hired the editors of the approved publishers, through the benefits of the CIP, to make their value judgments on behalf of the Federal Government in direct violation of the most basic established notions of freedom of speech.

> "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed ...smacks of an ideology foreign to our system. The basic values ...can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one

> to be trash may have for others fleeting or even enduring values.

Hannegan v. Esquire, 327 U.S. 146 (1946)

Further in the Opinion, the Court of Federal Claims wrote "there is no indication that Mr. Tsitrin's decision not to use an established publisher was intended in any way to be expressive; it was done simply because no publisher to which the book was proposed agreed to publish the book." Firstly, this supports the above conclusion that the Library of Congress is using the established publishers as their censors – once a book is rejected by the censor, it is ineligible for the CIP[5].

Secondly, this position is again thoroughly contrary to the law with respect to protected speech as expressed by the Supreme Court. Per *Metromedia, Inc. v San Diego*, 453 U.S. 490 (1981), since a normal and proper consequence of doing First Amendment expressive work (like designing a poster, or here writing a book) is the income earned, "commercial interest" is an expected legitimate and integral part of full-fledged First Amendment expression and is just as fully protected.

But further, there is an entire body of law that identifies infringement not in terms of censorship of specific subject matter but rather by discrimination "among different users of the same medium" *Police*

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[5] Moreover, a letter from a publisher was offered indicating that the rejections were specifically subject-matter based.

Department of the City of Chicago v Mosley, 408 U.S. 92 (1972) and were struck down where they allowed only labor protestors *Mosley; Cox v Louisiana*, 379 U.S. 536 (1965), denied park permits to Jehovah's Witnesses *Fowler v Rhode Island*, 345 U.S. 67 (1953); *Niemotko v Maryland*, 340 U.S. 268 (1951), or created a list of permissible billboards *Metromedia, Inc. v San Diego*, 453 U.S. 490 (1981). The complained-of regulations certainly fall directly into this type – preventing access to the chain of book distribution to those who are not members in the favored class of businesses.

VIII. Congress and Lorenzo de Medici – CIP, the NEA, and Constitutional Guidelines for Arts Patronage and Regulation

A. The NEA and Rust

The lower court relied on *National Endowment for the Arts v Finley*, 524 U.S. 203 (1998), together with a number of less relevant cases, to say that the government may set conditions upon eligibility for conferral of a government benefit.

While there are certainly numerous situations for appropriate government regulation, the principles set forth in *NEA v Finley* (and earlier in *Rust v Sullivan*, 500 U.S. 173 (1991), are thoroughly inapt to the current situation and would eliminate any rational conception of Free Speech. More appropriately, the paradigm for reviewing the effects of the CIP must be based on *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001).

In *NEA v Finley*, the Court expressly found that the NEA's ability to choose artwork was because "the Government is acting as patron rather than as sovereign."

The NEA provides its benefit in an open competition for artistic excellence in a very narrowly tailored structure. After the NEA's rules were scrutinized and found wanting in *Bella Lewitzky dance Foundation v Frohnmayer*, 754 F. Supp. 774 (CD Cal. 1991), they were thoroughly revamped when "Congress ...agreed to create an Independent Commission of constitutional law scholars" to develop the procedures. Finally, it is truly a contest for excellence and it in no way effects the arts markets outside of the competition.

In contrast, the Respondent provided no testimony that the CIP was developed with any exploration of the constitutional issues involved and it can in no way be seen as a self-contained contest for excellence – it provides the CIP to every book by a publisher with three or more authors. Because of the all pervasiveness of the CIP (among other things, the sole gateway to the automated libraries and book distributors), the government, if the rationale is taken seriously, makes itself patron over all established book publishers and all of their output of books. As patron, the government is properly able to dictate any and all editorial choices, nullifying the rationale of such mainstays of editorial liberty as *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974).

Similarly, the rationale for regulating speech in *Rust v Sullivan*, 500 U.S. 173 (1991) was that

government had established a program where the regulated speaker was charged with delivering the government's message. In effect, in the situation contemplated by *Rust*, the government is the real speaker, with the regulated party simply the government's mouthpiece. But this is likewise a thoroughly untenable rationale for allowing the CIP eligibility rules to persist – putting every publisher who benefits from the CIP into the role of speaker for the government would thoroughly invert every notion of a free press.

B. Distortion of the normal functioning of the impacted medium

Rather than the *NEA v Finley / Rust v Sullivan* schemes of government as employer or government as patron, the rational paradigm for viewing such an all inclusive program as the CIP must be under the *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001) as a benefit program to facilitate private speech. The stated purpose of the CIP was "to serve the nation's libraries by cataloging books in advance of publication ...saving libraries the time and expense of individually cataloging each book they acquire" and aid them in focusing on "titles that are most likely to be widely acquired by the nation's libraries." Thus, inasmuch as the CIP is simply a subsidy[6], it is a subsidy to advance book publishing and book availability through the

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[6] Though we respectfully submit that the CIP is not just a subsidy but a pre-publication "license" on free speech prohibited even under a plausible threat to national security. *New York Times Co. v. United States*, 403 U.S. 713 (1971)

libraries -- to facilitate private speech. *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001); *Rosenberger v Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

When, as here, the government uses or attempts to regulate a particular medium, the Courts have sought guidance from that medium's accepted usage to prevent Government regulation from distorting its usual functioning. "The First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium." *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001); *FCC v League of Women Voters of Cal.*, 468 U.S. 364 (1984)

The analysis under Velazquez is very similar to the "Investment Backed Expectations" analysis above. The medium impacted by the CIP is that of publishing and delivery of books. From time immemorial (except as various governments deliberately censored expression) there was only one class of books. When Albrecht Durer, Benjamin Franklin, Lewis Carroll, Mark Twain published their works there was no governmentally established two tier system distinguishing between "books" and "self-published book-like objects." All books were equally able to access all book purchasing markets and participated in the "marketplace of ideas" on an equal basis.

By restricting entry into the program to specific types of entities, the government distorts the medium of the press by artificially creating "more valid" and "less valid" types of expression. The restriction shores up a thoroughly artificial structure whereby books

which come from publishers who have published the work of more than three authors are "real" books – and may appear in libraries and other book venues, while other books are somehow "unworthy" of full recognition as books and thus "unworthy" of being allowed access into the various public access venues – the "market places of ideas". This is a thorough subversion of the normal functioning of a free press and therefore the CIP regulation which restricts eligibility for the program to books from publishers who have previously published three or more authors, and are not themselves authors, is Unconstitutional as contrary to the First Amendment. *Legal Services Corporation v Velazquez*, 531 U.S. 533 (2001).

IX. Lower Courts' evident Misunderstanding of the Standard for Motion to Dismiss and Summary Judgment Motion

The case before the Court was decided in the Court of Federal Claims on a Motion to Dismiss brought by the government and a Cross-Motion for Summary Judgment by Petitioners. It is evident from the Opinion that the Court of Federal Claims misunderstood the standards according to which it was to rule.

In order to grant a motion to dismiss pursuant to RCFC 12(b)(6) for failure to state a claim upon which relief can be granted, a court must assume that all undisputed facts alleged in the complaint are true, must draw all reasonable inferences in the non-movant's favor, and can only grant the motion if it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle

them to relief. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). In this case, the court failed to accept the specific undisputed facts and documentation presented by the non-movant, Overview Books, LLC and Lev Tsitrin, as true and failed to draw reasonable inferences in the non-movant's favor.

Likewise, with a well supported motion for summary judgment, no real facts disputed, and nothing but conclusory allegations and unsubstantiated speculation from the defendant, US, summary judgment for plaintiffs Overview Books and Lev Tsitrin was appropriate as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Plaintiffs-Petitioners submitted a number of items in support of their position, including Affidavits on personal knowledge and statements by industry experts pointing to the lack of ability of the established publishers to put forth "worthwhile books" (see for example P.App. E, p. 41a – "I wonder whether ...has the credentials to be giving people advice ... – When there are so many other people who have made this their lives work you know – who can't get a book deal – and its really – if its because of celebrity..."). Submissions included a study published by the Sunday Times of London (articles of January 1 and 2, 2006) which documented the inability of commercial publishers to recognize good writing (two books which had earned world wide acclaim were submitted to twenty-some publishers with the names of books and authors changed – and were roundly rejected) as well as a number of current individual stories documenting the same (like a book which remained unpublished for 15 years, until it was mentioned by Stephen King –

and within a week of that the author picked up a two-million advance; or the opposite – a thoroughly horrid piece of fluff, roundly recognized as such by most concerned, published and hyped heavily as a result of the author's connections).

In contrast, Respondents submitted nothing, not one Affidavit or reference to a finding, in support of any of their assertions – nothing but the "conclusory allegations and unsubstantiated speculation" found by this Court to be thoroughly insufficient. Nor did they challenge the Proposed Statement of Facts submitted by Petitioners (P.App. F, pp. 42a – 48a). But the Opinion of the Court of Federal Claims reads as if there were substantial submissions thoroughly discrediting those of Petitioners. The Court of Federal Claims failed to follow the established rules regarding the weighing of testimony on a Motion to Dismiss and Summary Judgment and we respectfully request that this Petition be granted to review and correct the lower court's misunderstanding of the standards.

X. The Illusory Substitute of the PCN Program

To those books which are not eligible for the CIP, the Library of Congress made available an "alternate" program – the Preassigned Control Number (PCN) program. The Court of Federal Claims stated that "participation in the PCN program confers some, but not all, of the benefits of the CIP program" (P.App. B, p. 14a) and this was judged as sufficient and persuasive to negate the taking.

Unfortunately, any benefit of the PCN is illusory. As the CIP regulation documents describe, the PCN program "assigns a Library of Congress Control Number ...to titles most likely to be acquired by the Library of Congress as well as some other categories of books. The publisher prints the control number in the book ..." (P.App. D, p. 35a)

This is a thoroughly meaningless service as the Library of Congress Control Number ("LCCN") is quite easily obtained without participation in the program. Moreover, this only shores up the difference between a "real" book and a "self published" book as, instead of printing the CIP information, including keywords, the publisher brands his deficient PCN work with a meaningless number – and, of course, there are no keywords, no distribution of publication notices, and no "catalog card sets that reflect the final verified CIP record" which the book vendors and libraries require before considering a book for purchase (P.App. D, p. 32a).

Now, the PCN does allow for some entrants to obtain a bibliographic record (based on a review of whether they are good enough) but, even for these "lucky" titles, "This record is not distributed and is not printed in the book" (P.App. D, p. 35a) – that is, the book is still conspicuously branded on the verso of its title page as a non-CIP, deficient work, there is no distribution of publication notices, and no "catalog card sets that reflect the final verified CIP record" which the book vendors and libraries require before considering a book for purchase (P.App. D, p. 32a).

In fact, all that the PCN provides is a meaningless number and the illusory joy of having a book in the Library of Congress and gets the attention of those authors less familiar with the process away from the CIP. "The CIP program and PCN program are mutually exclusive. Titles processed in one program are not processed in the other program." (P.App. D, p. 35a) Not only are they mutually exclusive, they are exact logical opposites and cannot possibly serve as alternatives.

Even under a simple Takings Analysis, divorced from considerations of fundamental First Amendment issues that of necessity present themselves in this context, the PCN fixes nothing that the CIP has broken – leaving the book in the same position with respect to access as if the PCN is not used. But, if the First Amendment is taken into consideration, the PCN becomes insufficient on its face under the standards summed up in *Reno v ACLU*, 521 U.S. 844 (1997) – "The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." (or, in this case – the government bans the independent publication of full-fledged books, leaving individuals to publish what are in effect targeted mailers).

XI. Standard of review – Arbitrary? Reasonable? Passing Strict-Scrutiny Review?

A. Constitutional Taking

The Fifth Amendment's Takings Clause allows a government regulation to take property if the taking is

for a public interest but the government must compensate the loser of the property for the loss. *Kelo v New London*, 545 U.S. 469 (2005); *First Lutheran Church v Los Angeles County*, 482 U.S. 304 (1987).

This is the primary relief sought by petitioners. Even assuming that the eligibility requirement was fully legal and proper, the only difference between ordinary Copyright infringements by the government (covered directly under 28 U.S.C. § 1498(b)), and the restrictions challenged here is that, while in the ordinary case the government actually benefits from the taking, in the matter at hand the government destroys the author's property right without benefit to the government – a difference with no legal impact whatever *First Lutheran Church v Los Angeles County*, 482 U.S. 304 (1987); *United States v General Motors Corp.*, 323 U.S. 373 (1945); *Pumpelley v Green Bay Co*, 13 Wall.166 (1872) . In the matter of compensation, the question of reasonableness matters not one whit – only becoming relevant to the question of whether the regulation must be struck down. *Kelo v New London*, 545 U.S. 469 (2005).

B. Regulations Against Public Interest

The challenged regulations can not be anything but unreasonable as they put at least a century of this Court's jurisprudence regarding publishing on its head.

In *Associated Press v US*, 326 US 1 (1945), the established publishers attempted to entrench themselves by creating a scheme to disadvantage startups sufficiently to get them to fold. Rightly, the

government sought to stop this scheme and the Supreme Court supported the government announcing a firm public interest in the unimpeded flow of ideas.

Later, in *Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974), Justice Burger described in some detail the concentration and conglomeratization of the nation's newspapers and press media as a whole, noting with regret the increasing monopolization of newspaper markets and dwindling public access, leading to slanted and biased reporting without the possibility for correction. However, since in *Tornillo* this was a natural outcome of the flow of business rather than a scheme by publishers, this Court could not sustain government regulations intended to even the playing field. The Court ruled:

> "We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle...
>
> Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer 'the power of reason as applied through public discussion' and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press."

If you can't beat them join them – evidently, after the government fought to even the playing field in *Associated Press* and *Tornillo*, it has in this matter decided instead to shore up the market inadequacies it once fought – by creating a method of controlling the

press which explicitly disenfranchises start-up and independent press.

Whereas the CIP eligibility rules directly impact the free flow of ideas in a free press, they must be examined not just under the normal standard of reasonableness for the usual illegal takings claim, but under strict-scrutiny "presum[ing] that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it" *Reno v ACLU*, 521 U.S. 844 (1997), cf: *New York Times Co. v. United States*, 403 U.S. 713 (1971).

At the very least, if the lower court's contention is accepted that Petitioners' interest here is "commercial," then the regulations must be examined under the heightened scrutiny required for commercial speech under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) – which requires findings satisfying a four part test. But the government has offered nothing to satisfy any findings of necessity. It has simply argued that the eligibility rules are a practical way to keep down costs[7].

The Petitioners urge that this petition for certiorari be granted as, not only do these rules clearly fail any standard of review higher than reasonableness, they are self evidently thoroughly unreasonable and

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[7] A problem to which the petitioners offered several solutions which would not impact Fifth or First Amendment interests. Nor would they impact any other Constitutional interest or other established public goods.

arbitrary as their only purpose (and certainly only result) is to undermine the tendency of the publishing market toward democratization and to shore up the conglomerates –to deprive the public of the majority of possible discussion and ideas in contravention of well established public interests.

CONCLUSION

For the above reasons, the Petitioner asks that this Petition for Writ of Certiorari be granted so that this Court can settle the fundamental constitutional question of how to define a Fifth Amendment Taking of property where the property involved is First Amendment expressive intellectual property. The basic issues of property in creations of the mind have resurfaced in pieces for over a hundred years and the challenged regulation has been in place for thirty seven years, has created a status quo in publishing which has changed popular perception to create an under-class of books, and has so far evaded review.

Respectfully submitted,

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Date: January 18, 2008